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15 *Attorneys for Defendants*

16 UNITED STATES DISTRICT COURT  
17 NORTHERN DISTRICT OF CALIFORNIA  
18 OAKLAND DIVISION

19 REARDEN LLC and REARDEN MOVA  
20 LLC,

21 Plaintiffs,

22 vs.

23 WALT DISNEY PICTURES, a California  
corporation,

24 Defendant.  
25  
26  
27  
28

Case No. 4:17-cv-04006-JST-SK

**DEFENDANT'S NOTICE OF MOTION  
AND MOTION SEEKING PARTIAL  
RECONSIDERATION OF ORDER  
GRANTING IN PART AND DENYING IN  
PART DEFENDANTS' MOTION IN  
LIMINE NO. 1 [ECF 584]**

Judge: Hon. Jon S. Tigar  
Ctrm.: 6 (2nd Floor)

1                   **NOTICE OF MOTION AND MOTION FOR PARTIAL RECONSIDERATION**

2                   PLEASE TAKE NOTICE that Defendant will and hereby does move for an Order to  
 3 reconsider a portion of the Court’s Order Granting in Part and Denying in Part Defendants’  
 4 Motion in Limine No. 1, ECF 584 (the “Order”). Specifically, Defendant seeks leave to request  
 5 that the Court reconsider the portion of the Order that says the Court will inform the jury that the  
 6 Court in the SHST litigation entered a preliminary injunction ordering DD3 to stop using MOVA.  
 7 This motion is made on the ground that “a material difference in fact or law exists from that which  
 8 was presented to the Court” when Motion in Limine No. 1 was filed. Civil. L.R. 7-9(b)(1).

9                   **MEMORANDUM OF POINTS AND AUTHORITIES**

10                  Defendant respectfully requests that the Court reconsider the portion of the Order stating  
 11 that the Court will “inform the jury of the fact that, in the same *SHST* litigation identified above,  
 12 the court issued a preliminary injunction on June 17, 2016, ordering DD3 to stop using MOVA.”  
 13 Order at 5. Rearden intends to use that information to present evidence regarding DD3’s alleged  
 14 copying of MOVA software in violation of the injunction and to argue the jury should find  
 15 Defendant liable because of that copying.

16                  Reconsideration, while an exceptional remedy, is warranted under Civil L.R. 7-9(b)(1).<sup>1</sup>  
 17 The Order denied Rearden’s request to introduce the entire preliminary injunction order to the  
 18 jury. Order at 4-5. It then “adopt[ed] Disney’s suggestion that it inform the jury of the fact” of the  
 19 preliminary injunction. *Id.* at 5.

20                  Defendant’s suggestion, however, was made on September 15, *see* ECF 488, before this  
 21 Court granted Defendant’s summary judgment motion on both (i) contributory copyright  
 22 infringement and (ii) vicarious liability based on “DD3’s post-injunction use of MOVA,” ECF 555  
 23 (“MSJ Ruling”) at 8, 12. The MSJ Ruling constitutes a material change, L.R.7-9(b)(1), because  
 24 the preliminary injunction and DD3’s alleged violation of it are no longer relevant to any issue in  
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26                  <sup>1</sup> Although Defendant believes the Order erred in determining that the facts of the *SHST* statement  
 27 of decision and Ninth Circuit’s affirmance may be admitted, Defendant does not seek  
 28 reconsideration of that portion of the Order, which was the subject of extensive briefing and  
 argument at the Final Pretrial Conference. Defendant does not waive, but instead expressly  
 reserves, its rights to challenge that portion of the Order on appeal.

1 the case. Rearden wants to put those matters before the Court solely to inflame the jury and sow  
2 confusion.

3 At the Final Pretrial Conference, Rearden erroneously claimed that the preliminary  
4 injunction and DD3's alleged violation of it remain relevant, notwithstanding the MSJ Ruling.  
5 Specifically, Rearden argued that the MSJ Ruling held only that "damages are not available for  
6 any post-injunction work," and that the MSJ Ruling resolved "a separate question from liability."  
7 Final Pretrial Conference Tr. 47:14-19. That is wrong. The MSJ Ruling actually holds that  
8 Defendant is not liable for contributory infringement at any point in time, and that Defendant is  
9 not vicariously liable for any post-injunction infringement by DD3 because Rearden has zero  
10 evidence that Defendant received a direct financial benefit from any such post-injunction copying.  
11 The evidence is undisputed that Defendant "did not use in the film any shots prepared by DD3  
12 using MOVA after that point." MSJ Ruling at 12. This was a failure of proof on a necessary  
13 element of Rearden's vicarious liability claim. *Id.* ("Rearden has failed to carry its burden to  
14 create a dispute of material fact as [to] Disney's financial benefit in connection with DD3's post  
15 injunction use of MOVA").

16 Because Defendant is not liable for any of DD3's activities post-dating the injunction, the  
17 fact of the injunction is irrelevant to Rearden's case. It has no possible bearing on the only issues  
18 left for the jury to decide. With respect the liability, the only remaining issues are (1) whether  
19 Defendant had the legal right and practical ability to control any *pre-injunction* infringement by  
20 DD3, and (2) whether Defendant received a direct financial benefit from any *pre-injunction*  
21 infringement by DD3. The injunction could not have affected any legal right or practical ability to  
22 control activities that pre-dated the issuance of that order. With respect to Rearden's requested  
23 remedy of disgorgement, the only remaining issue is whether Rearden can show a causal nexus  
24 between any *pre-injunction* infringement by DD3 and *Beauty and the Beast* profits and, if so, what  
25 portion of such profits are attributable to the *pre-injunction* infringement. Because the injunction  
26 post-dates all conduct for which Defendant could be liable, the injunction and DD3's alleged  
27 violation of it have no bearing on the disgorgement remedy Rearden is pursuing.

1 Rearden plainly still intends to use the fact of the injunction and DD3's alleged violation of  
2 the injunction to inflame the jury. That is why it has included on its Exhibit List multiple  
3 documents relating to DD3's post injunction activity (including a number of internal DD3  
4 communications) and has designated reams of testimony relating to the same topic. Allowing the  
5 jury to hear that the Court ordered DD3 to stop using MOVA and that there are internal DD3  
6 emails (none shared with Defendant) that Rearden claims show Greg LaSalle copying MOVA  
7 software into RAM, is bound to lead the jury to think that Defendant should be held vicariously  
8 liable for DD3's post-injunction conduct. But the Court has held that Defendant *cannot* be liable  
9 for any such conduct.

10 All of this evidence also will confuse the jury about what the Court decided, and when. As  
11 the Court has found, the preliminary injunction ruling did not resolve, even on a preliminary basis,  
12 the question of ownership. MSJ Ruling at 8. That issue was not decided until over a year later,  
13 when the Court issued its Statement of Decision. But lay jurors not familiar with civil procedure,  
14 and not familiar with the contents of the preliminary injunction ruling, likely will be inclined to  
15 speculate that the preliminary injunction ruling did resolve the ownership issue.

16 The fact of the injunction and DD3's subsequent conduct is not relevant given that  
17 Rearden has no *claim*—not just no request for disgorgement—against Defendant for whatever  
18 DD3 was doing after the injunction. The same is true of Rearden's proposal to question in-house  
19 litigation counsel about when he learned of the preliminary injunction, "how he knows he was the  
20 first person to learn of the injunction, and whether he notified the animation studio about this  
21 fact." ECF 511 (Rearden Opp. to Defendant's MIL No. 2). None of this has any bearing on  
22 Rearden's lone remaining claim, but is instead calculated to inflame the jury.

23 The injunction should be excluded as irrelevant or, at a minimum, because any slight  
24 relevance is outweighed by the obvious risks of confusion and prejudice.

25 \* \* \*

26 For the above reasons, Defendant respectfully requests that the Court grant Defendant  
27 leave to seek partial reconsideration and then order that the entire *SHST* preliminary injunction,  
28 including the fact of the injunction, be excluded.

1  
2 DATED: November 10, 2023

MUNGER, TOLLES & OLSON LLP

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4 By: /s/ Kelly M. Klaus  
5 KELLY M. KLAUS

6 *Attorneys for Defendant*  
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